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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 547

WILLOW TERRACE DEVELOPMENT CO., INC., AND POST OAK MANOR BUILDING CO., INC., *Petitioners*

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Amicus Curiae Brief is respectfully filed on behalf of the National Association of Home Builders in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in the above styled and numbered cause. Consents of the parties, pursuant to Rule 42(1) of the Supreme Court of the United States, have been obtained and are furnished herewith.

The National Association of Home Builders views the decisions of the United States Court of Appeals for the Fifth Circuit and the Tax Court of the United States with considerable concern, and fears that, unless standards of valuation are enunciated which require a realistic determination of fair market value of trade-in homes, a severe depressant on home building operations across the nation will result.

As the years have passed since the termination of World War II, it has become increasingly necessary for home builders to accept trade-in houses as one part of the total sales transaction. To a large extent, the acceptance of a trade-in home constitutes the prime inducement motivating the home buyer to acquire a new residence. Whether, and to what extent, the home builder may generate a profit from the resale of the trade-in home is therefore often an entirely secondary consideration.

It is further a fact that the stated "allowance" for the trade-in home represents a reduction in, or adjustment of, the purchase price of the new home rather than a reflection in value of the trade-in home.

In effect, in today's housing market, home builders are forced to accept trade-in homes as a means of selling new homes; thereafter, they "take their chances" that, at some indefinite later date, cash proceeds will be realized from the disposition of the trade-in home. The mere fact that a contract to sell such trade-in home may be entered into shortly after the sale of a new home constitutes one element only in the mechanics of the total selling process.

The National Association of Home Builders respectfully submits that the "amount realized" from the

sale of the new home within the meaning of section 1001(a) should include, (and from the record in the instant matter, can be taken to include), only the actual realizable market value, if any, of the trade-in home.

Section 1001(a) has long been construed to restrict the determination of the amount realized to actual market values. In the case at bar, the home builder received a trade-in home which it later disposed of in exchange for a mere promise to pay from a random purchaser. In effect, the fair market value of the house should be measured, at best, by the fair market value of that promise to pay rather than the "allowance" or the amount of such promise, as reflected in the promissory instrument. Since a mere promise of future payments for which no real market value exists does not have a fair market value, we do not believe that section 1001(a) requires or authorizes generation of tax. See, e.g., *Miller* v. *U. S.*, 235 F. 2d 553 (6th Cir., 1956); *Percy* v. *Comr,* 152 F. 2d 183 (8th Cir., 1945); see, also, *Nitterhouse* v. *U. S.,* 207 F. 2d 618 (3rd Cir., 1953), citing *Badell* v. *Comr,* 30 F. 2d 622 (2nd Cir., 1929).

In any event, the method used by the Tax Court, which was erroneously affirmed by the Fifth Circuit, to compute fair market value is not only in conflict with a prior holding of that Circuit but is also in conflict with the position of the Sixth Circuit (see *Stiles* v. *Comr.,* 69 F. 2d 951 (5th Cir., 1934), and *Miller* v. *U. S.,* 235 F. 2d 553 (6th Cir., 1956)). In determining the fair market value of trade-in homes, the Tax Court, with the affirmance of the Fifth Circuit, stated as follows:

> "The evidence shows that [the taxpayer] was usually able to sell the trade-in houses within a

> few days after they were acquired, which makes the selling price fairly reliable as a measure of the fair market value of the houses when acquired . . ." [40 T.C. 703.]

Under the circumstances here present, however, to determine fair market value by looking solely to the "price" without considering the form in which this "price" was received is clearly in error. The legal deficiency in the approach to fair market value there used is that it fails to consider the fact that fair market value is as much determined by the terms of purchase as by the "sales price." A house that would sell for $50,000 with the seller receiving current principal payments and a first mortgage on the property would no doubt have a higher fair market value than one that would sell for the same $50,000 "sales price," but with the seller taking a second mortgage and waiting 20 years for his first principal payment.

A true test of fair market value must thus take into consideration matters such as security for the resulting debt and loss of the value of money caused by a delay in payment. This point was recently reaffirmed by Congress by its addition of Section 483 to the Internal Revenue Code of 1954.* The problem there corrected was the practice of selling an asset "worth $1,000 for $1,300 payable over 10 years,"** but without interest. Congress there pointed out that the $1,300 "sales price" certainly did not coincide with the fair market value of the property ($1,000). The difference was, in that instance, the value of money.

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* P.L. 88-272, 88th Cong., H.R. 8363, Feb. 26, 1964, Sec. 224.

** S. Rept. No. 830, 88th Cong., 2d Sess. (1964), p. 101.

Here, however, in valuing the trade-in houses the Tax Court and Fifth Circuit looked only to the "sales price" while ignoring the fact that the "sales price" must have, by its very nature, been greatly inflated in excess of the fair market (*cash*) value of the property sold in recognition of (a) the junior nature of the liens received, (b) the lack of concern over the financial condition of the purchasers,* (c) the small (approximately $200) down-payments received on the sales, and (d) the fact that payments on the "sales price" were not to commence until all senior mortgage claims had been paid.

The National Association of Home Builders submits that the approach used in valuing trade-in houses used by the Tax Court in this case is both erroneous and of extreme detriment to the home-building industry.

CONCLUSION

For the above reasons, a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be granted to the Petitioners in this cause.

Respectfully submitted,

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* See facts as found by the Tax Court, 40 T.C. at p. 696.